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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS MANUEL FRANCO, Defendant and Appellant.	G028475 (Super. Ct. No. 00CF1914FA) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis Choate, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda L. Cartwright-Ladendorf, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted Luis Franco of making a criminal threat (Pen. Code, § 422)[1] and unlawful sexual intercourse (§ 261.5). He contends there was insufficient evidence he made a criminal threat and the trial court abused its discretion in denying probation. For the reasons stated below, we affirm.

FACTS

Fourteen-year-old Crystal M. (who turned 15 in June 2000) began living and having sexual intercourse with 26-year-old defendant Luis Franco in February 2000. On July 8, Crystal stayed at an apartment where another boyfriend, Eric (Arredondo or Gonzalez), spent his weekends. Crystal's friend and Eric's niece, 17-year-old Rosalva (Ana) Sanchez, lived there, as did Sanchez's mother and siblings, and daughter-in-law Christina Arredondo and her children.

Defendant and Crystal argued the next day about Crystal's liaison with Eric, which at a minimum involved a night spent together and "hickies." They drove to Sanchez's apartment around 11:00 p.m. Along the way, defendant punched Crystal several times in the face, bloodying her nose and lip. When they reached their destination, defendant persuaded Sanchez to come to his car on the pretense of speaking with Crystal. Crystal, bloodied and crying, refused to speak. Defendant asked Sanchez if she was the person who had telephoned, and had told him he had no right to hit Crystal. Sanchez admitted she was and they argued. Defendant called Sanchez a "pendeja" (asshole) and she replied, "don't you call me like that." Keeping his arms in his pockets, defendant said, "do you want to die?" Defendant produced something Sanchez thought was a gun.[2] He said he was looking for Eric. He yanked a gold chain off her neck and told her if she wanted it back she should tell Eric that "he [Eric] knows where he [defendant] lives and go get it, that's if he has the balls to get it." Sanchez claimed she

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[1] All further statutory references are to the Penal Code.

[2] Crystal testified and told police the item was the faceplate off defendant's car stereo. Police did not find a weapon.

was only "kind of" frightened during their encounter. She *was* scared that defendant "was going to go after [Eric] and kill him."

Standing nearby, Christina Arredondo heard defendant say something like "if Eric wants this, he knows where to find me," and "he wanted to kill Eric." After defendant left, Sanchez and Arredondo went inside, spoke to Sanchez's mother, and decided to call the police.

The police could not find Eric and he did not testify. Defendant told the police he pulled the chain off Sanchez's neck and challenged Eric to come and get it. He denied threatening to kill Eric, claiming he sought only to confront and fight him.

A jury convicted defendant of unlawful sexual intercourse (§ 261.5, subd. (d)), making a criminal threat (§ 422, a misdemeanor) and cohabitant abuse (§ 273.5, a misdemeanor), but acquitted on the robbery charge. The court sentenced defendant to the low term for unlawful sexual intercourse and imposed two concurrent one-year terms on the misdemeanors.

Substantial Evidence of Criminal Threats

Defendant challenges the sufficiency of the evidence to support the section 422 conviction. We "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307.)

A violation of section 422 requires (1) defendant willfully threaten to commit a crime which will result in death or great bodily injury to another person, (2) he make the threat with the specific intent that the statement be taken as a threat, (3) the threat be so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, (4) the threat actually cause the person threatened to be in sustained fear for his or her own or immediate family member's safety, and (5) the threatened person's fear must

be reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 228; *People v. Bolin* (1998) 18 Cal.4th 297.)

Here, Christina Arredondo's testimony was sufficient to show defendant unequivocally threatened to kill Eric.[3] Sanchez testified she was afraid defendant would shoot her uncle. Taken in context, defendant's statements conveyed a gravity of purpose and an immediate prospect of execution. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013 [all of the surrounding circumstances should be taken into account to determine if a threat is criminal, including defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant].) Put another way, a reasonable person in Sanchez's position, confronted with a death threat against her uncle from an irate lover who thinks she and the uncle are interfering with his romantic relationship, and who holds what appears to be a weapon, was entitled to take his threat at face value. We note this was no transitory observation: Sanchez harbored this fear long enough to participate in the decision to telephone police. (See *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 ["sustained" means a period of time that extends beyond what is momentary, fleeting, or transitory].)

Defendant's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 is unavailing. There, a student became angry with his teacher for accidentally hitting him with a door when the teacher opened it, and the minor said, "I'm going to get you" or "I'm going to kick your ass." Considering these remarks in context, the court held the minor's threats lacked credibility as indications of serious, deliberate statements of purpose. There was no evidence the minor and the teacher had a prior history of disagreements, nor was there evidence that a physical confrontation was imminent. Nor would the threat have caused a reasonable person to be in sustained fear for his or her personal safety. "[T]he police were not notified until the day after the incident.

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[3] As this case involved a threat to an immediate family member there was no requirement the threat be communicated to Eric. (Cf. *People v. Felix* (2001) 92 Cal.App.4th 905 [uncommunicated threat to psychotherapist insufficient to support conviction]; *In re David L.* (1991) 234 Cal.App.3d 1655, 1657.)

Apparently, [the teacher's] fear did not exist beyond the moments of the encounter." (*Id.* at p. 1140.)

The contrary is true here. Sanchez testified she was afraid the defendant would carry out his threat and called the police immediately after the encounter. In sum, there was sufficient evidence to support the conviction.

Denial of Probation

Defendant next complains the trial court abused its discretion in denying probation. We disagree.

The probation report recommended placing defendant on probation with a suspended state prison sentence, a nine-month jail term, and the usual terms and conditions of probation. Noting that Crystal was expecting defendant's child and had been placed under the juvenile court's jurisdiction, the report further recommended defendant have no contact with Crystal, assume financial responsibility for the child, and enter a batterer's treatment program.

At sentencing, the trial court acknowledged the choice between prison or probation was "a difficult decision" and engaged the defense in a discussion on this point. The court indicated it believed this was a "sex-based" case, more serious than most, and stated he and the probation officer saw the facts "a little bit differently." After an extended discussion of the pros and cons, including whether defendant would support his child, the court imposed a state prison sentence: "I think it's sort of an exercise in futility to put you on probation. You're going to do whatever you're going to do. The fact that the law allows this gentleman to go back and see his baby, the irony of which is the product of the relationship itself, and to say, well, the baby now needs a father, doesn't ring with me. It may ring with someone else, but it doesn't ring with me."

Defendant argues "Crystal[']s pregnancy and [defendant's] ability to support and/or visit the child were not proper determinative factors . . . to deny probation. A denial of probation should not be used to sever a defendant's parental rights to visit a child."

The court's comments, when considered in context, merely focused on the consequences of defendant's criminal conduct. The court acknowledged placing defendant on probation would allow him to support his child, and this fact might sway other courts to grant probation. But the court did not consider this sufficiently mitigating; indeed, the court found defendant's continuous sexual relationship with a mentally impaired 14-year-old girl, culminating in her pregnancy, outweighed any remedial considerations.

Here, the criteria for granting or denying probation, enumerated in California Rules of Court, rule 4.414, weighed against probation. Defendant engaged in repeated instances of sexual intercourse with a significantly underaged victim (rule 4.414(a)(1) [nature, seriousness, and circumstances of the crime as compared to other instances of the same crime]); both victims were vulnerable (rule 4.414(a)(3)); the crime of unlawful intercourse was not committed because of an unusual circumstance unlikely to recur (rule 4.414(a)(7)); defendant had a prior record (drunk driving, drug possession) and it appeared his crimes were becoming increasingly serious (rule 4.414(b)(1)); and defendant committed these crimes while on diversion for a drug offense (rule 4.414(b)(2)). Moreover, the probation report furnished additional facts supporting a prison sentence. For example, Sanchez reported she had observed bruises on Crystal on more than one occasion and that Crystal feared defendant.

"The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion." (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) Defendant has failed to meet this burden. There are no grounds for reversal on this record.

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.